

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIL WILLIAM THOMAS,

Defendant-Appellant.

UNPUBLISHED

December 13, 2011

Nos. 299917; 299918

Washtenaw Circuit Court

LC Nos. 09-001956-FH;

09-001957-FH

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

In these consolidated appeals, defendant, Jamil William Thomas, appeals by leave granted his conviction of second-degree home invasion, MCL 750.110a(3) (docket number 299917), while in docket number 299918 he appeals by leave granted his convictions of two counts of resisting and obstructing a police officer, MCL 750.81d(1) and conspiracy to commit second-degree home invasion, MCL 750.110a(3) and MCL 750.157a. Defendant was sentenced to 38 to 180 months' imprisonment for second-degree home invasion, 16 to 24 months' imprisonment for both counts of resisting and obstructing, and 57 to 180 months' imprisonment for conspiracy to commit second-degree home invasion. We affirm.

Defendant's only argument on appeal is that offense variable 13 was improperly scored at 25 points in both of his cases and should have been scored at zero. The trial court's scoring decisions at sentencing are generally "reviewed de novo." *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). "The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score[.]" *Id.* "In general, '[s]coring decisions for which there is any evidence in support will be upheld.'" *Id.*, quoting *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Additionally, "[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

MCL 769.34(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on

appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

Defendant failed to preserve this issue on appeal by raising it before the trial court or by filing a timely motion for a remand with this Court. Nonetheless, a sentence that, due to a scoring error, is outside the guidelines, is appealable even absent proper preservation and is reviewed for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). The first step in applying MCL 769.34(10) to a case involving an unpreserved claim of scoring error is to determine whether there was a scoring error that would result in a different minimum sentence range. See *id.* at 310-312. Because we find no scoring error, defendant's sentence was properly within the minimum sentence range and MCL 769.34(10) mandates that defendant's sentence be affirmed.

OV 13 is scored for a "continuing pattern of criminal behavior." MCL 777.43(1). In the present case, OV 13 was scored at 25 points pursuant to MCL 777.43(1)(c), which provides: "The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." In scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). A trial court is required to score OV 13 at the highest appropriate level. See MCL 777.43(1).

A violation of MCL 750.81d, for resisting and obstructing, is categorized as a crime against a person. MCL 777.16d. Second-degree home invasion is also categorized as a crime against a person. MCL 777.16f. Further, with respect to defendant's conspiracy to commit home invasion charge, while "[c]onspiracy is designated as a crime against public safety in MCL 777.18[,]" for sentencing purposes the trial court must "consider the nature of the conspiracy for which defendant was convicted in this case when scoring OV 13." *People v Jackson*, 291 Mich App 644, 648; ___ NW2d ___ (2011). The holding in *Jackson* was based upon the plain language of MCL 777.21(4), which explicitly requires that both the offense variable level and the offense class be determined by the "underlying offense." Therefore, because the conspiracy charge was premised on second-degree home invasion and home invasion is a crime against a person, the conspiracy to commit second-degree home invasion would be properly counted for purposes of scoring OV 13. See *Jackson*, 291 Mich App at 649. Thus, all four crimes for which defendant was convicted constitute crimes against a person.

The Supreme Court's recent decision in *People v Bonilla-Machado*, 489 Mich 412; 803 NW2d 217 (2011), does not implicitly overrule this Court's decision in *Jackson*. In *Bonilla-Machado*, the Supreme Court emphasized the importance of consistently following the statutory language within the sentencing guidelines as enacted by the Legislature. The Supreme Court explained that the plain language of the statute must apply and disapproved of this Court's attempt to depart from the express language within the statute by categorizing a crime as both a crime against public safety and against a person after the Legislature had explicitly categorized the crime as one against public safety. *Bonilla-Machado*, 489 Mich at 421-429. As we have noted, in *Jackson* this Court followed the plain language of MCL 777.21(4) when it concluded that the underlying offense should be used when scoring a conspiracy conviction under OV 13.

Although both *Bonilla-Machado* and *Jackson* involved the scoring of OV 13, each case dealt with a different version of the statute and the statutory categorization of a different offense. While *Bonilla-Machado* did not address how a conspiracy conviction should be scored under OV 13, *Jackson* did consider that issue and in doing so was consistent with *Bonilla-Machado*'s later directive that the plain language of the sentencing guidelines be enforced. Consequently, *Jackson* is still good law.

Defendant also argues that the offenses were not a part of a pattern of felonious activity because his convictions stem from conduct on the same day and involve the same criminal transaction. Defendant's argument is contrary to the plain language of the statute that only requires a pattern of "crimes against a person," not that those crimes against a person bear any similarity to one another or require separate criminal transactions. See *Francisco*, 474 Mich at 86, citing MCL 777.43. Additionally, each of defendant's convictions stems from an independent act. Defendant's second-degree home invasion conviction was based on his entry into an apartment where he participated in stealing several items. Defendant's conspiracy to commit second-degree home invasion stems from an unsuccessful plan to break into a different residence, and each of defendant's resisting and obstructing convictions related to conduct with respect to a different police officer. In *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), we found the scoring of OV 13 at 25 points was appropriate for a pattern of three or more crimes against a person based on four concurrent convictions for making child sexually abusive material. Finally, defendant's reliance on *People v McLaughlin*, 258 Mich App 635, 674 n 17; 672 NW2d 860 (2003), is misplaced because *McLaughlin* involved one continuous sexual assault, not distinct crimes against a person. *Id.* at 642.

In docket number 299918, defendant was scored ten points for offense variable 12. Defendant alleges that OV 13 should not have been scored because the same criminal acts were scored under OV 12. Although defendant is correct that the same criminal act cannot be scored under both OV 12 and OV 13, see MCL 777.43(2)(c), the prosecutor's argument on OV 12 was specifically premised on a dismissed count of attempted home invasion and a third, dismissed count of resisting and obstructing. Hence, defendant's convictions were not the basis for scoring OV 12, nor could they be since OV 12 may only be scored where, "[t]he act has not and will not result in a separate conviction." MCL 777.42(2)(a)(ii).

Affirmed.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio